United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1345

United States Court of Appeals

For the Second Circuit.

Index No. 68 Civ. 2049 (CMM).

LAFORTUNE, Substituted for JONES & MCKNIGHT, Inc.,
Plaintiff-Appellant,

against

S.S. IRISH LARCH, her engines, etc., IRISH SHIPPING, LTD., CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.,
Defendants,

and

IRISH SHIPPING, LTD.,
Defendant and Third-Party Plaintiff-Appellee,

against

CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.,
Third-Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLEE IRISH SHIPPING, LTD.

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Issues Presented for Review.

1. Was the District Court in error in declining to dismiss the complaint for failure to prosecute diligently?

2. Was it clearly erroneous for the District Court to find after trial that the ocean carrier was exonerated from liability for any damage which may have been sustained by a cargo of coils of bright basic wire because the shipper knowingly and fraudulently misstated the cargo to be standard wire rods?

3. Was it clearly erroneous for the District Court to find after trial that the ocean carrier was exonerated by reason of the insufficiency of the bindings which the shipper employed to secure the coils?

4. Did the cargo owner prove that it sustained any damages?

Statement of the Case.

This is an action to recover for cargo damage, prosecuted by the subrogated underwriter of a shipper of bright basic wire coils against a shipowner and a charterer, which used the ship in its liner service. The action was initially commenced in the name of the consignee, in whose place the shipper's underwriter was substituted. Although the Chicago terminal operator was named as a defendant, it was not served with process. Only the shipowner appeared at the trial.

The summons and complaint were filed on May 17, 1968, although service was not made at that time. On March 24, 1971, an additional summons was issued. Process was delivered to the shipowner's agents in New York on April 5, 1971—four years after delivery of the

cargo. The charterer was not served until February 7, 1973, although there had been prior informal notice to the charterer. On April 3, 1973, the shipowner applied for a dismissal of the complaint for failure to prosecute with reasonable diligence pursuant to F.R.C.P., Rule 41(b) (2a). As appears from the affidavits of D. J. McNulty and Michael Santoro in support of the motion and that of Patrick Burke in reply to the opposing affidavit (the motion papers are not reproduced in the Appendix), after receipt of the complaint in 1971 the shipowner undertook an investigation of the transaction, but discovered that it had retained no records of the voyage. The vessel had been sold in October 1968 and the Master died on August 1, 1971. No prior notice of claim had been issued to the shipowner. The plaintiff had attempted informal service of process upon the shipowner's underwriter's New York correspondents and upon the shipowner's then New York agents, which was rejected in each case with the advice to make formal service. The shipowner in Ireland did not have actual notice of the pendency of the suit until April 1971. However, the District Court denied the motion to dismiss, without opinion.

As a result of the lack of notice and the absence of any records, the shipowner was severely handicapped in its preparation for trial. However, photographs of the cargo were obtained from the Chicago terminal and were shown to a cargo consultant, who testified concerning his findings. Further investigation led to a former employee of the terminal who had personally dealt with the cargo and was willing to come to New York to testify. The testimony of this witness and the cargo expert, as well as the admissions of the shipper's witnesses, discussed more fully hereinafter, resulted in certain factual findings which exonerated the ocean carriers.

It is respectfully submitted that there is ample evidence in the record to support the District Court's factual findings pursuant to which the ocean carriers were exonerated; indeed that there was not sufficient evidence in support of the shipper's claim of damages and that the decision dismissing the complaint should be affirmed.

Argument.

The District Court exonerated the ocean carrier on the basis of two findings of fact. Applying the criteria of 46 U. S. C. §1304(5), third paragraph, the District Court found as a fact that

> "Obviously, the shipper knowingly misstated the nature and value of the shipment. Not only is a lesser rate obtained when material is shipped in rods than in coils because rods require less space, but also because the value of rods is different and calls for a different type of handling" (11a).

Applying 46 U. S. C. §1304(2) (n), the District Court also found that

> "It is perfectly clear that the cargo was insufficiently packaged for shipping" (11a).

It is the appellant's request that the Court of Appeals upset the findings of the trial judge, although the appellant has not demonstrated that those findings were clearly erroneous. As this Court stated in *M. W. Zack Metal Company v. S. S. Birmingham City*, 311 F. 2d 334, 337-8 (2nd Cir. 1962):

> "A fair statement of the rule is that we may not set aside a finding of fact unless we are left with the 'definite and firm conviction that a mistake has been committed', *United States v. United*

States Gypsum Co., 1948, 333 U. S. 364, 395, 68 S. Ct. 525, 542. 92 L. ed. 746, and that we will reverse 'most reluctantly and only when well persuaded.' *United States v. Aluminum Co. of America*, 2 Cir., 1945, 148 F. 2d 416, 433" at pp. 337-338.

It is respectfully submitted that no mistake has been committed, but that the record as a whole clearly exculpates the ocean carrier in this case.

POINT I.

The complaint should have been dismissed for failure to prosecute diligently.

The summons and complaint were filed on May 17, 1968, although proper service was not made until April 1971. Informal service had been rejected by the shipowner's New York agents and underwriter's agents and Owners had never received actual notice of the action. (Affidavits of D. J. McNulty and Patrick J. Burke). While the shipowner frequently had other vessels call at New York over the years, no attempt was made to attach one of these. Owners had received no prior notice of this claim, inasmuch as hiring of stevedores and handling the details of delivery were the charterer's responsibility, pursuant to Clause 8 of the New York Produce Exchange Time Charter under which the Vessel was operating. (Affidavit of D. J. McNulty). The charterer was not served with process until February 1973, while the terminal operator was never served.

Upon receipt of the summons and complaint, an extension of time to answer was obtained and an investigation of the claim was undertaken. The shipowner looked

into its records in Dublin, while its agents in Chicago sought information there. However, the Irish Larch had been sold and her Master on the subject voyage died shortly after service of process. The shipowner's investigation proved unproductive and the matter was turned over to attorneys for defense. An answer was served on September 28, 1972, reserving the defense of laches. On April 5, 1973, the shipowner moved to dismiss the complaint, but its motion was denied without opinion.

Although the complaint appears to have been filed barely within the one-year limitation provided in the United States Carriage of Goods by Sea Act, 46 U. S. C. §1303 (6), it has frequently been held that

> "The mere institution of a suit does not of itself relieve a party from the charge of laches, and if he fails in the diligent prosecution of the action the consequences are the same as if no action had been taken. *California Casualty v. Industrial Indemnity,* 74 F. Supp. 408, 409 (S. D. Cal. CD 1947)."

Further,

> "If injury results from the failure to file a suit within one year, then by the same token injury must be presumed for failure to have issued an alias summons for more than a year after the filing of the suit, and more than two years after the cause of action accrued." (74 F. Supp., at p. 410.)

In a case similar to the instant one, *Howmet Corporation v. Tokyo Shipping Co. Ltd.,* 318 F. Supp. 658 (D. Del. 1970), a claim was made for rust damage to a cargo of coiled sheet steel. The complaint was timely filed, but service upon the charterer/carrier was not effected until

four years after discharge. The general agent for the shipowner deposed that the agent's records disclosed no notice of the claim, that the only notice received was the summons and complaint and that the delay made investigation impossible because the vessel was no longer under charter to the defendant, the operations manager and claims manager had left the defendant's employ, and the agent's operations file for the voyage could not be found and was presumed to have been destroyed (318 F. Supp. at p. 661). The Court dismissed the complaint for failure to prosecute, noting:

> "The service and notice presently involved were made more than four years after the alleged damage claim accrued and more than three years after the filing of the complaint and the expiration of the limitations period for bringing suit. It clearly appears that this long delay in accomplishing service or otherwise giving notice to Tokyo or its agent has prejudiced Tokyo's ability to properly investigate and defend itself against the claim.
>
> "Further, Howmet advances no explanation or reason whatsoever for the inordinately long delay in either giving notice or serving process upon Tokyo. At the time suit was filed, Howmet's attorney specifically instructed the Clerk not to issue process to Tokyo. The record is otherwise barren of any further attempt to cause any kind of process to be issued or served upon Tokyo until December 23, 1969. While it is true that Delaware's long-arm statute did not become effective until July 3, 1967, no effort was made to obtain service by that method until more than two years later. The Miller affidavit also states that vessels chartered by Tokyo have discharged cargo at the Port of Wilmington on the average of four to six times a year. Yet, no attempt has been made by Howmet to attach these ships nor has any other effort been made to serve Tokyo's sub-agent, Lavino Shipping Company, or its general agent, Gannet Freighting Inc., while in this jurisdiction."

In *Richardson v. United White Shipping Company,* 38 F. R. D. 494 (N. D. Cal. SD 1965), an action was brought on a shipboard accident. The complaint was timely filed within a year after the incident, but service was not effected until two years and four months after filing. The defendants alleged that the accident had never been reported to a ship's officer or entered in the log, and the ship had been sold. The Court stated

> "Under these circumstances prejudice to the defendants is obvious. The essential question, however, is whether there has been a failure to prosecute the action with reasonable diligence.
>
> "The Court finds not only failure to prosecute this action with reasonable diligence, but also resulting prejudice to an owner who obviously cannot properly defend itself against a claim of which it has had no knowledge until almost three and a half years after the occurrence out of which the claim arises.
>
> "Failure to use due diligence in serving a summons is more fraught with possibilities of unfairness and abuse than failure to diligently prosecute an action after summons is served. For, in the latter case, a defendant has at least a timely opportunity to investigate the claim and prepare its defense" (38 F. R. D. at pp. 496-497).

As noted by the court above, the essence of an application under Rule 41(b) is not prejudice, but a failure to prosecute with reasonable diligence. However, it is respectfully submitted that the existence of prejudice to Owners has indeed been demonstrated in the case at hand. As stated by this Court of Appeals in *Messenger v. United States,* 231 F. 2d 328, 331 (2nd Cir. 1956):

> "Under Rule 41(b), a motion to dismiss may be granted for lack of reasonable diligence in prosecuting [citations omitted]. *The operative condition of the Rule is lack of due diligence on the*

> *part of the plaintiff—not a showing by the defendant that it will be prejudiced by denial of its motion. Hicks v. Bekins Moving & Storage Co., supra* [115 F. 2d 406 (9th Cir. 1940)]. It may well be that the latter factor may be considered by the court, especially in cases of moderate or excusable neglect, in the formulation of its discretionary ruling. But under the circumstances of this case *it would have been a gross abuse of discretion to make a finding of excusable neglect* * * *." (Italics supplied.)

Appellant's very arguments on appeal, that the shipowner assertedly furnished no first-hand evidence of certain facts, emphasizes the prejudice which was done to the shipowner by the late notice of claim in this case, and which would be furthered if this case were remanded.

POINT II.

Carriers should be exonerated by reason of the shipper's knowing and fraudulent misdescription of the cargo.

The cargo at issue is described in the shipping invoice and the shipper's survey report as coils of "bright basic wire" (140a, 148a). However, it is described in the bill of lading as bundles of "wire rods" (142a). As testified to by the shipper's vice president, as well as the shipowner's cargo expert, the term "wire," without a qualifying predescription, means ordinary standard wire, whereas "bright basic wire" is another commodity entirely (38a, 114a-115a). Every witness on the trial agreed that there are significant differences between bright basic wire and standard wire.

The shipper's vice president, Mr. Delbourgo, admitted that bright basic wire is a more valuable commodity than wire rods, and that bright basic wire in coils commands a greater freight rate than wire rods in bundles (38a-39a). He expressly admitted that the description in the bill of lading was erroneous, since bright basic wire is more valuable (39a).

The shipper's surveyor, Mr. Juric, testified to differences in the uses of the commodities and also indicated that bright basic wire requires indoor storage to avoid rust, whereas wire rods may be stored outdoors because it suffers no economic depreciation by reason of rust (59a-60a). It is significant, however, that Mr. Juric's purported expertise was limited in that he did not know whether there was a difference in the value of the two commodities (61a).

Appellant subpoenaed as their witness the charterer's agent, Ms. Walker, who testified on cross examination that the freight rate for bundles of wire rods was about $15/ton at the time in question, whereas the rate for coils of bright basic wire was $35-$40/ton (80a-81a).

Shipowner's witness, Mr. Lindstrom, as a former employee of the Chicago terminal was a fact witness, as well as an expert by virtue of his many years of experience in adjusting claims concerning steel cargoes (86a-87a). He indicated that there are qualitative differences between the two commodities which make bright basic wire more valuable (93a) and testified that the terminal rates for handling bright basic wire are higher than those for handling wire rods because the former must be stored indoors to avoid rust (91a-92a). It should be remembered that under the liner form bill of lading in this case, the carrier accepted the cost of discharging the cargo. Therefore,

the freight rate reflects, among other factors, the handling costs at the terminal.

Shipowner's expert witness, Mr. Siebel, testified that the stowage factor of coils of wire is about three times that of bundles of wire rods, which means that the former occupy more space in a ship's holds (115a). Additionally, Mr. Siebel testified to the qualitative differences between the commodities and confirmed that bright basic wire is the more valuable (114a-115a). Mr. Siebel also testified that bright basic wire is more susceptible to rust than standard wire because the former has been further processed and has lost some of its natural protection from oxidation (119a-120a), which agrees with Mr. Lindstrom's experience, but contradicts shipper's surveyor's testimony concerning the cargo's susceptibility to rust. (Mr. Juric had testified that the products were equally subject to rust, although rust didn't affect the value of standard wire, whereas bright basic wire has a cosmetic consideration [60a]).

It is provided in the United States Carriage of Goods by Sea Act, 46 U. S. C. §1304(5), that:

> "Neither the carrier nor the ship shall be responsible *in any event* for loss or damage to or in connection with the transportation of the goods if the *nature or value* thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading." (Italics added.)

The shipper appears to contend that an element of fraud is absent in that the carrier assertedly did not rely upon the shipper's misdescription, since the cargo was in part unwrapped and undisguised at the time of loading. However, the carrier's reliance was in specifying a certain freight rate when the cargo was booked. Here, the rate

was the lower rate for standard wire rods (81a). By the time the cargo was at the dock or indeed in the ship's tackle, it was too late to renegotiate the freight rate and it would have served no purpose to refuse to carry the cargo.

More to the point, while a ship's captain may be able to tell the difference between "coils" and "rods," he is by no means qualified or obligated to know the difference between *bright basic wire* and *standard wire.*

Appellant asserts that there is not sufficient evidence in the record to show who prepared the bill of lading, overlooking the fact that the document itself specifies that it contains the "Shipper's Description of the Goods" (142a), and Mr. Siebel's uncontested testimony that it is the custom in the liner trade, wherein general cargo is carried for any number of shippers, for the shipper or his freight forwarder to prepare the bills of lading (125a-126a). This was not refuted by the appellant who had available at the trial both its own vice president and the agent of the charterer/liner service. Given the evidence of custom and the statement in the bill of lading, the District Court's finding that the misrepresentation was that of the shipper is not clearly erroneous. *Hellenic Lines, Ltd., v. Director General of India Supply Mission*, 452 F. 2d 810, 814 (2nd Cir. 1971).

Shipper's contention that there is no evidence that the misstatement was made knowingly is without merit, since the shipper obviously knew the true nature and value of its own product.

The shipper in this instance obtained a lower freight rate and exposed the ship to a greater liability in the event of a cargo claim by misdeclaring the cargo to be standard

wire, which is of a lesser value and less costly handling at discharge than bright basic wire. Additionally, the cargo was misdescribed as bundles of rods instead of coils, the former using less space in the ship. Plainly, the nature and value of the cargo were knowingly misstated by the shipper and the carrier was induced to act to its detriment in reliance thereon, within the meaning of Section 1304(5). The shipper, in obtaining a freight rate of one-third the appropriate amount, derived a benefit from the misrepresentation. The shipper failed to come forward with any evidence whatever in rebuttal of the carrier's evidence that there was a knowing and fraudulent misstatement. The District Court's factual determination in this respect was amply supported in the record. The statute provides that under the circumstances the carrier and the ship shall not be liable "in any event." The judgment of the District Court should be affirmed.

POINT III.

Carriers should be exonerated by reason of the insufficiency of the packaging of the cargo.

Mr. Lindstrom testified that the coils of steel wire in this case were shipped in bundles of several coils each and the bundles were bound by baling wire (90a). He further testified that the ½" diameter bands on each of the individual coils were too narrow and that the baling wire on the bundles of coils was improper because it was too flexible to hold the coils to each other (90a). Mr. Siebel testified that on the basis of the facts sworn to by Mr. Lindstrom concerning the width of the bands and the nature of the baling wire, and based independently upon his study of the shipper's surveyor's photographs of the

cargo (116a, 149a) and the terminal's photographs (158a)*, the bands were indeed too narrow and the baling wire insufficient. Mr. Siebel testified that such bindings could not withstand normal cargo handling, but would slip or break during routine operations (117a, 129a-130a). In this, Mr. Lindstrom concurred (90a-91a). Both of these experienced cargo men agreed that the method of binding used was not up to the standard used in the industry generally for coils of wire (91a, 117a). The shipper's surveyor, on the other hand, did not refute this testimony. He testified that he could not recall the nature of the strapping on the individual coils or the bindings which tied the several coils together into stacks (66a-67a), although he did agree in principal that soft steel baling wire, as observed by Mr. Lindstrom and as appeared in the photographs, would be insufficient (66a-67a).

The shipper alleges that neither Mr. Lindstrom, nor Mr. Siebel had observed the cargo at the time of discharge. However, Mr. Siebel's testimony was based in large part upon the very photographs taken by the shipper's surveyor. The photographs were taken before the coils were recoopered, otherwise the surveyor would not have found these coils to be a total loss. If there was a conflict between the testimony of Mr. Siebel and that of the shipper's surveyor, Mr. Juric, the trial court would have been

*The terminal's photographs were identified by Mr. Lindstrom as having been taken from the terminal operator's business file and the notation on the back of the photos was in the handwriting of and signed by the terminal's superintendent (104a). The trial judge accepted the photographs as depicting the cargo, but declined to accept the notation, which was nevertheless reproduced in the appellant's Appendix (158a). It is respectfully submitted that the notation should have been received into evidence as a business record and as support for the testimony of Mr. Lindstrom and Mr. Siebel that the packaging was found to be insufficient at the time of discharge.

warranted in accepting that of Mr. Siebel, in view of certain adverse reflections on Mr. Juric's credibility and expertise, discussed more fully hereinafter in Point III. However, there was no conflict. Mr. Juric simply didn't know the nature of the bindings.

The shipper has also misconstrued certain of Mr. Siebel's testimony in arguing that it was his opinion that the shipment could have been handled properly despite the manner in which it was banded. Mr. Siebel's response was to the question whether *coils* could have been handled properly although the stevedores had been anticipating *rods* (125a). There was no mention in the question about the sufficiency of the bindings, but Mr. Siebel expressly qualified his answer to mean "under normal conditions," obviously including normal bindings (123a-124a). In fact, Mr. Siebel testified adamantly that routine handling of the coils would have caused the narrow bands to break and slip (117a, 129a-130a). Moreover, the shipper may not impose upon the carrier an extra burden of care by simply not packaging the shipment properly. *Bache v. Silver Line, Inc.*, 110 F. 2d 60 (2nd Cir. 1940); *Regal Fibers, Inc., v. Holland American Line*, 302 F. Supp. 953, 958 (E.D. Pa. 1969); *S. S. Exiria*, 200 F. Supp. 809, 812 (S.D.N.Y. 1961).

Appellant also misconstrues a statement in the hatch survey (151a) concerning the stowage of the coils. The fact that some of the coils were found to be slanted in the holds is consistent with the finding that the baling wire binding the coils into stacks was stretched loose, resulting in well stowed coils becoming slanted. The trial court's implicit finding in this respect, which was not argued in appellant's post-trial brief, is supported by testimony (66a-67a, 90a, 116a-117a) and is not clearly erroneous.

It is respectfully submitted that there is more than sufficient evidence to affirm the District Court's finding that the damage in this case, to whatever extent some damage may have occurred, resulted from the slipping and breaking of bands and baling wire which were below the standard in the industry and insufficient for the purpose, and that the carrier should be exonerated from all liability pursuant to 46 U. S. C. §1304(2)(n).

POINT IV.

Shipper has failed to prove that any damage occurred to this cargo.

Although the trial judge found that the shipper had proved a *prima facie* case by showing delivery of the cargo to the vessel in good condition and delivery to the consignee with some damage, it was unnecessary to and the court did not discuss the extent of any such damage, since the carrier was exculpated from liability. It is respectfully submitted that the shipper failed to prove any damages whatever.

A. There was no evidence that at the time of discharge the cargo was damaged to the extent claimed.

The shipper's witness, Ms. Walker, as well as Mr. Lindstrom and Mr. Siebel all testified that the market for imported steel products declined sharply prior to delivery of this cargo in May, 1967, because of speculative buying which resulted in an oversupply when an anticipated steel strike didn't occur and a coal strike was settled (82a-83a, 94a, 113a). Significantly, the shipper's purported expert, Mr. Juric, declined knowledge of market conditions at the time (62a). The invoice for the goods

(140a) indicates in the upper left-hand corner that the cargo was shipped pursuant to a sale contract dated January 1, 1967. The contract was not offered in evidence or available at the trial. It is apparent that the price fixed on January 1, 1967, was higher than the market value on May 31st, and that the consignee elected simply to abandon a sound, but unprofitable cargo, as Ms. Walker testified many other importers had done (82a, 83a, 84a).

No notice of damage was sent to the charterer's Chicago sub-agents until June 8th (54a-55a, 154a), which was eight days after discharging was completed and six days after the vessel departed from Chicago (80a). Moreover, no notice of claim was ever sent to the shipowner (80a). As appears from the shipper's surveyor's report (148a), the shipper's surveyor was appointed on June 9th. However, no invitation to a survey was ever issued to the charterer or the shipowner (55a-56a). In view of the economic advantage of abandoning even a sound cargo in a depressed market, the absence of notice of damage and notice of survey in this case must be looked upon with extreme suspicion. *The S.S. Brooklyn Maru,* 72 A.M.C. 2548 (D. Md. 1972).

The survey itself occurred on June 14th; two weeks after discharge. The surveyor declared 131 coils, or about 48% of the cargo, to be a total loss. However, in direct conflict with this estimate is the charterer's hatch survey taken at the time of discharge, and introduced into evidence by the shipper (150a). According to page 2 of the hatch survey report, the surveyor observed the discharge and handling of the cargo on the pier. The surveyor noted some bending of the cargo in the holds and some further damage on the pier. On page 3, the surveyor again notes that his remarks "incl[ude] cargo handling on pier." Ms. Walker also testified on ship-

per's direct examination that the hatch survey customarily includes the condition of the cargo after discharge on the dock (74a-75a). In the surveyor's estimate, the full extent of damage at the completion of discharging was only *8%* of the total cargo, and not *48%* of the total as contended by shipper's surveyor two weeks later. Additionally, on the back of a photograph annexed to the hatch survey report (152a), the surveyor remarked that the coils were in "generally fair to good condition. Some bands broken. No rust."

Shipper offered no testimony as to the condition of the cargo at the time of discharge, or the reason that the cargo was not taken from the pier at that time. The shipper's vice president testified that he didn't know whether the shipper or the consignee sent anyone to the pier at the time of discharge (43a). In view of the shipper's failure to show the condition of the cargo at the time of discharge, and the hatch surveyor's report which shows only 8% damage at that time, the shipper's contention of 48% damage based on a survey taken two weeks later should be disregarded. The District Court accepted the shipper's surveyor's testimony over objection, but only subject to connection of the condition of the cargo at the time of discharge with that at the time of the survey (48a). Later, the District Court denied the shipowner's motion to strike the surveyor's testimony for failure to connect (57a). It is respectfully submitted that the motion to strike should have been granted and that the shipper failed to prove a *prima facie* case.

If any further damage was sustained by the goods on the pier, it was not the responsibility of the carrier, since the vessel's "liability as a carrier continues until a reasonable time has elapsed * * * for the subsequent removal of the goods by the consignee." *Young v. Lehman,* 27 Fed. 383, 385 (S.D.N.Y. 1886). The consignee had more

than ample opportunity to take the cargo, but abandoned 48% of it although only 8% at most was damaged. As discussed further hereinafter, even that 8% could have been reconditioned.

The apparently limited extent of any damage at the time of discharge compared with the apparently exaggerated estimate at a later time reinforces the suspicion cast by the late notice of claim and the absence of an invitation to the carrier to attend the survey.

B. There was no credible evidence of the nature or extent of physical injury or economic damage to the cargo.

Shipper's surveyor's report was not prepared for some eight months after the survey, and the surveyor has since destroyed his contemporaneous notes (58a). However, Mr. Juric testified that the notes were no more comprehensive than his perfunctory checklist type survey report (45a, 58a). No mention is made in the report of rust or crimping, although the surveyor testified that these were among the damages he assessed (49a, 58a, 63a). It is respectfully submitted that the omission of such items of damage in a survey report on a cargo of bright basic wire coils is tantamount to an affirmative representation that no such damage existed. Moreover, although he testified that there was substantial crimping, Mr. Juric was unable to point to any crimping in his photographs (63a). Mr. Lindstrom, who observed the cargo, recalls that there was no crimping (102a). The recoopering would not have straightened out any crimps if they existed, so they would have been apparent to anyone who observed the cargo at any time (110a). Mr. Siebel studied the shipper's surveyor's photographs with a magnifying glass and was unable to find crimping, although he was able to see the cargo clearly (130a).

Mr. Juric's report also indicates that the equipment used to handle coils was improperly operated. However, Mr. Juric did not know what the proper equipment was. The charterer's hatch survey (150a at p. 2) states that rope slings were used for discharging. Mr. Juric stated that he did not know whether rope slings were proper equipment for the discharge of wire coils (69a). Mr. Siebel testified that they were (119a). Mr. Juric certainly was not present on the pier and did not see what equipment was used to handle the coils on the pier. Mr. Lindstrom testified that the stevedores' standard practice is to utilize special single pronged forklifts which are readily interchangeable with the double pronged forklifts usually found on hi-lo's, and that this is indeed a proper method of handling (103a, 111a, 119a).

It is respectfully submitted that Mr. Juric's testimony concerning the nature and extent of physical damage be disregarded in view of the conflicts between his report and that of the hatch surveyor; the conflicts between his testimony and his own report and photographs; and the conflicts between his testimony and that of Messrs. Lindstrom and Siebel.

Concerning the economic injury sustained by the cargo, Mr. Juric simply referred to the invoice price of the shipment, although he acknowledged that there is usually a difference between the invoice price and the fair market value (62a). Of course, the latter is the measure of damages for injury to cargo. *The St. Johns N.F.*, 263 U. S. 119, 44 S. Ct. 30, 68 L. Ed. 201 (1923). Mr. Juric stated that he was not familiar with the market value of steel products at the time in question (62a). Therefore, he was not qualified to assess the economic injury or to testify on that subject. Ms. Walker, Mr. Lindstrom and Mr. Siebel all testified that the market was in an ex-

tremely depressed state. It is evident that any damages were substantially below the invoice price. It is respectfully submitted that appellant has utterly failed to meet the burden of proof of showing either the extent of physical damage or the value of any cargo which may in fact have been damaged. The shipowner's motion to dismiss the complaint for failure to prove damages, which was made at the close of the shipper's evidence (85a), should have been granted.

C. The shipper failed to take action to mitigate its damages.

Mr. Juric testified that 131 coils were a total loss because the cost of preparing the cargo for transportation on trucks would have exceeded the salvage value (52a-53a). He offered this judgment notwithstanding that he admittedly did not know the salvage value (63a-64a). It was manifest as well that he did not know what the cost of preparing the goods would have been. His estimate was that the cost would exceed $5,000 (64a) and that the labor would include cutting the wire with acetylene torches (53a). In fact, the terminal recoopered the coils, without cutting them, at a cost of only $1,984, for which the terminal was not reimbursed (156a). Indeed, not only were the goods made fit for acceptance by truckers, but, in the opinion of Mr. Lindstrom, the cargo was restored to at least 95% of its sound physical condition (88a-89a). Mr. Siebel testified that the normal injury to this cargo is 2% or 3% in any case (130a). It may reasonably be said that virtually no actionable injury was sustained by the owner of this cargo. Conceivably, the cost of recoopering could have been recovered if the carrier were not otherwise exonerated under Points II and III, *supra*. However, the shipper did not incur the expense of recoopering.

It is interesting to note also that Mr. Siebel saw a distinction between recoopering and reconditioning. The former simply prepared the cargo for overland shipment, although in so doing it restored this particular cargo to 95% of its sound condition. However, Mr. Siebel testified that it was possible to actually recondition the cargo and thereby restore it as if new (121a).

The consignee, however, was not interested in recoopering, reconditioning or otherwise being burdened with this unprofitable cargo. The only "loss" the cargo owner suffered was the decline in the general market. If the shipper suffered some loss by reason of the consignee's rejection of the cargo, such loss was not a result of cargo damage but a result of the consignee's breach of the sale contract.

CONCLUSION.

The judgment of the District Court should be affirmed and appellee should be awarded the costs of the appeal.

Respectfuily submitted,

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